



**DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
1901 SOUTH BELL STREET 2ND FLOOR
ARLINGTON, VA 22202-4508**

November 10, 2004

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Retaliation for engaging in protected Equal Employment Opportunity (EEO) activity

The purpose of this memorandum is to inform you of the Equal Employment Opportunity Commission's (EEOC) primary basis for finding discrimination, retaliation, and to seek your assistance in assuring a workplace that does not discourage those affected from exercising their rights.

Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act prohibit retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity. Protected activity is that activity which either opposes a practice made unlawful by one of the employment discrimination statutes (the "opposition clause"); or filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute (the "participation clause").

Although some individuals inappropriately allege retaliation as a defense mechanism or as a display of resentment to those who take actions unpopular to those individuals, in many situations, leaders improperly express frustration with individuals who have engaged in protected activities. Often this is expressed in subtle ways, which supervisors may not realize are prohibited. For example, a manager may change his or her manner of speaking to the person, avoid the person, or changes the nature of work assignments. Actions such as these may lead the subject individual, or co-workers, to believe that the change behavior was motivated by the protected activity, thus having a chilling effect on the future exercise of those rights. Supervisors should not be reluctant to manage, but they must, however, ensure that their actions are not improperly motivated or perceived to be so.

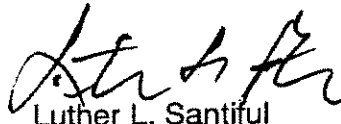
Voluntary compliance with an effective enforcement of the anti-discrimination statutes depend in large part on the initiative of individuals to oppose employment practices that they reasonably believe to be unlawful, and to file charges of discrimination. If retaliation for such activities were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings.

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With your support I believe that we can sensitize our leaders to the cause and effect of reprisal allegations, emphasize professional leadership rather than take matters personally, and thus reduce the number of reprisal allegations. Please ensure that your EEO and legal advisors are adequately informing the workforce regarding their obligations concerning the anti-retaliation protections.

For your information, I have enclosed an Information Sheet that dicusses how EEOC adjudicates retaliation claims. The sheet also lists retaliation findings against the Army and the associated costs.

The Point of Contact for further information or questions is Mr. Stanley Kelley, Deputy, Equal Employment Opportunity Compliance and Complaints Review, who may be reached at (703) 607-1448 or by email: kellest@hqda.army.mil.



Luther L. Santiful
Director of Equal Employment
Opportunity and Civil Rights

Enclosure

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EEOC Adjudication of Retaliation Claims

Through its Compliance Manual, No. 915.003, Sect. 8, the EEOC interprets the statutory retaliation clauses "to prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter [complainant] or others from engaging in protected activity," including threats and harassment in or out of the workplace. *See generally Jones v. Dept. of State*, EEOC Appeal No. 01995660 (January 24, 2002); *Cobb v. Dep't of Treasury*, EEOC Request No. 05A11026 (July 20, 2001).

The Commission's definition is inconsistent with the majority of federal courts, which have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. Other courts have construed the provisions more broadly, but still require that the action materially affect the terms, conditions, or privileges of employment.

The EEOC disagrees with those decisions and concludes that such constructions are unduly restrictive. The Commission finds that the degree of harm suffered by the individual goes to the issue of damages, not liability. The EEOC qualifies this position by stating that petty slights and trivial annoyances are not actionable, but this standard is not well defined and many administrative judges make extremely restrictive interpretations. These disagreements often lead to confusion as to what conduct is unlawful versus inappropriate.

Supervisors must continue to manage and not be intimidated by the protected activities of their employees; however, they must also be sensitive as to how their actions will be perceived not only by the employee engaging in the protected activity, but also by the employee's co-workers.

SAMPLE EEOC ADMINISTRATIVE JUDGE RETALIATION FINDINGS AGAINST THE ARMY

- **FEB 2004** Supervisor recommended that co-workers avoid the complainant. *[\$3K damages]*
- **FEB 2004** Supervisor rescinded offer of reassignment. *[\$7.5K damages, \$17K fees]*
- **JAN 2004** Supervisor testified that complainant made a career of filing EEO complaints. *[\$10K damages]*
- **NOV 2003** Supervisor revoked complainant's collateral duty facilitator duties stating that he could no longer trust after filing an EEO complaint. *[\$10K damages, \$12K fees]*
- **OCT 2003** Complainant asked to report the details of her discussion with the EEO Office. *[\$1.5K damages]*
- **JUL 2003** Complainant was relieved of some supervisory duties after filing complaint. *[\$300K damages, \$43K fees]*
- **MAY 2003** Supervisor told panel that complainant had named him in an EEO complaint. *[\$10K damages]*
- **MAY 2003** Supervisor denied complainant a detail to avoid appearing to "buy him off." *[declaratory relief only]*
- **MAY 2003** Complainant was involuntarily detailed after filing a complaint and the manager made disparaging remarks about the EEO process. *[\$110K damages, \$80K fees]*
- **MAR 2003** Management detailed complainant to unpopular shift after she alleged sexual harassment (while returning harasser to previous duty location). *[\$30K damages]*